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In the Supreme Court of the United States

October Term, 1982

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE,
Petitioner

v.

DONALD EUGENE GARDNER et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Do Section 522(f) and Section 106(c) of the Bankruptcy Code show a sufficient intent by Congress to set aside the Eleventh Amendment immunity of States in the context of lien avoidance proceedings?

2. May Congress, acting pursuant to the bankruptcy power, set aside the Eleventh Amendment immunity of States?

3. Is a confessed judgment against real estate a "judicial lien" subject to avoidance under 11 U.S.C. §522(f) even though such liens are created by agreement, given for valuable consideration, and have, under Pennsylvania law, most of the legal incidents of a short form mortgage?

TABLE OF PARTIES

A list of parties in the Court below is as follows:

1) Commonwealth of Pennsylvania, Department of Public Welfare

2) Donald Eugene Gardner

3) United States of America

4) Household Finance Consumer Discount Company*

5) York Federal Consumer Discount Company*

6) David S. August, D.D.S.*

It is believed that the parties indicated by an asterisk (*) do not have an interest in this appeal. The clerk will be so notified pursuant to rule 19.6.

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE,
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v.

DONALD EUGENE GARDNER,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Commonwealth of Pennsylvania, Department of Public Welfare petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 685 F.2d 106 (3rd Cir., 1982) and appears in the Appendix (App. infra, 1a-7a). No opinion was rendered by the District Court for the Western District of Pennsylvania (App. infra, 8a). The opinion of the Bankruptcy Court for the Western District of Pennsylvania is not reported but appears also in the Appendix hereto (App. infra, 9a-11a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 11, 1982. A petition for rehearing was denied on September 9, 1982. The jurisdiction of this Court is invoked under the Act of June 25, 1948, C. 646, 62 Stat. 928 codified at 28 U.S.C. §1254 (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution reads as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State"

Section 522(f)(1) of Title 11 of the United States Code provides as follows:

> "(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in the property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—
>
> (1) a judicial lien; ...."

Section 106(c) of Title 11 of the United States Code provides as follows:

> "(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> (1) a provision of this title that contains 'creditor', 'entity' or 'governmental unit' applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units."

STATEMENT OF THE CASE

Donald Eugene Gardner filed a voluntary petition in bankruptcy on January 15, 1981. Prior to seeking relief under Chapter 7 of the Bankruptcy Code, 11 U.S.C. §701 *et seq.*, he had received from the Pennsylvania Department of Public Welfare the sum of $19,294.68 in public assistance.

Since Mr. Gardner owned real property he was required by DPW to sign several reimbursement agreements, Forms Pa-9, as a condition of receiving assistance. He signed six of these forms each in the amount of $2,000. Each form contained a confession of judgment provision authorizing the entry of judgment for $2,000 plus costs. A copy of the Form Pa-9 is reproduced in the Appendix (App. 33a-35a).

All six Pa-9 forms were filed with the clerk of courts in York County. They were indexed as judgments against Mr. Gardner's real estate. Five of the six judgments were revived as Pennsylvania law permits. Thus on January 15, 1982, when Mr. Gardner filed bankruptcy, judgments totaling $12,000 were on file and were, under Pennsylvania law, liens on Mr. Gardner's real property in York County. It is agreed that if allowed to stand, all but $650.00 of these liens would impair exemptions provided in Section 522(d) of the Code.

Shortly after filing bankruptcy, Mr. Gardner initiated an adversary proceeding to void DPW's liens. The Bankruptcy Court held that DPW's liens on the

Gardner property were "judicial liens" subject to avoidance under Section 522(f) of the Code. The District Court and the Court of Appeals affirmed.

The Pennsylvania Department of Public Welfare seeks certiorari because the Court of Appeals refused to honor the Commonwealth's Eleventh Amendment defense. Decisions of this Court have made clear that congressional intent to set aside Eleventh Amendment immunities must be clearly expressed. No clear expression by Congress may be found in the context of Section 522(f) of the Bankruptcy Code.

The Pennsylvania Department of Public Welfare also seeks certiorari to determine the scope of congressional power to set aside the Eleventh Amendment immunity of States. DPW asserts that Congress lacks the power to set aside the Eleventh Amendment immunity of states when acting pursuant to its Article I Section 8 powers.

Finally, DPW seeks certiorari to review the statutory issue of whether its liens are "judicial liens" within the meaning of the Bankruptcy Code. Liens of confessed judgments are created by agreement of the parties and, under Pennsylvania law, have most of the legal incidents of a mortgage. Confessed judgments should be classified as "security interest" under the Bankruptcy Code.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals Decided the Question of Eleventh Amendment Abrogation in a Manner Which Conflicts With Applicable Decisions of This Court

The weight of authority favors what has come to be called the "clear statement" approach to Eleventh Amendment immunity. Under this view, if Congress wishes to subject a state to private suit, it is up to that branch to clearly express its intent to do so. *Freimanis v. Sea-Land Service Inc.*, 654 F.2d 1155 (5th Cir., 1981).

The "clear statement" approach is drawn from this Court's decisions in *Employees of the Department of Health and Welfare v. Department of Public Health and Welfare*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed. 2d 251 (1973); *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974); and *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed. 2d 358 (1979).

These decisions consistently refuse to imply congressional intent to abrogate the Eleventh Amendment from an ambiguous statute and uncertain legislative history. Instead they require that a statute "explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States." *Quern*, 440 U.S. at 345. Congress is not presumed to lift the Eleventh Amendment immunity of states silently. *Employees*, 411 U.S. at 284-285. The "threshold fact

of congressional authorization" must be present. *Edelman*, 415 U.S. at 672.

Congress has manifested its intent to partially abrogate the Eleventh Amendment immunity of States in Section 106(c) of the Bankruptcy Code. However the abrogation is explicitly restricted to certain sections of the Bankruptcy Code. Section 106(c) restricts Eleventh Amendment abrogation to provisions of the Bankruptcy code containing the key words "creditor", "entity" or "governmental unit."

The Third Circuit below did not respect Congress' choice of limited abrogation. Instead it extended the reach of Section 106(c) to a provision of the Bankruptcy Code not containing any of the key words. The Court of Appeals held that Pennsylvania could be named as a party defendant in a lien avoidance proceeding under Section 522(f) notwithstanding the fact that Section 522(f) does not contain the words "creditor", "entity" or "governmental unit."

The Circuit states that the legislative history of Section 522(f) suggests that, for purposes of lien avoidance, no distinction was intended between governmental and non-governmental entities. However if one looks at the legislative history cited by the Court below one will see that there is absolutely no indication that Congress even considered the issue of application of Section 522(f) to the States.

It would have been very easy for Congress to write a statute which abrogates the Eleventh Amendment immunity of states completely in bankruptcy. Congress chose not to do so. Congress restricted its attempt at abrogating the Eleventh Amendment to certain provisions of the Bankruptcy Code containing cer-

tain key words. The Court of Appeals ignores this clearly expressed limitation on Eleventh Amendment abrogation and instead finds abrogation in a provision of law not containing the key words chosen by Congress.

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2. The Question of Congressional Power Under Article I Section 8 To Abrogate Eleventh Amendment Immunity Is Important and Should Be Addressed by This Court

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This Court has held that Congress may set aside the Eleventh Amendment immunity of states when acting pursuant to the post-civil war amendments. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed. 2d 614 (1976); *Hutto v. Finney*, 437 U.S. 678, 95 S.Ct. 2565, 57 L.Ed. 2d 522 (1978). The Court has also held that Congress may abrogate Eleventh Amendment immunities when a state constructively consents to abrogation by entering a federally regulated area. *Parden v. Terminal R. Co.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed. 2d 233 (1964). However no decision of this Court has squarely addressed the issue of congressional power under the Article I Section 8 powers when a state has not constructively consented to abrogation.

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3. The Statutory Issue Regarding the Characterization of Confessed Judgments in Bankruptcy Is Important and Should Be Addressed by This Court

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Under Pennsylvania law a confessed judgment against real estate is created by an agreement to enter

judgment. Thus under the Bankruptcy Code a confessed judgment could be characterized as either a lien created by agreement, 11 U.S.C. 101(37), or a judicial lien, 11 U.S.C. 101(28). The Court of Appeals characterized a confessed judgment as a judicial lien.

The Third Circuit has noted that a confessed judgment in Pennsylvania serves "most of the same functions as a mortgage." *In re Ashe*, 669 F.2d 105, 109 (3rd Cir., 1982). Indeed under Pennsylvania law most of the traditional incidents of a judgment are stripped away from confessed judgments. Debtors are given most of the protections of a mortgage. Under Pennsylvania law creditors may not simply execute on a confessed judgment. Instead they must provide notice of an intention to foreclose, followed by an original action akin to foreclosure. Act of June 30, 1974, P.L. 13, No. 6, §407(a), as amended, Act of October 5, 1978, P.L. 1100, No. 258, §1, Pa. Stat. Ann. Title 41, §407(a) (Purdon Supp. 1981-82).

A confessed judgment against real estate, taken as security for a loan, does not pose any of the evils Congress intended to address through Section 522(f)(1). That provision was designed to undo the actions of unsecured creditors who bring legal action against the debtor shortly before bankruptcy. H.R. Rep. 95-595, 95th Cong., 1st Sess. 126, *reprinted in* 1978 U.S. Code Cong. & Ad. News 6087. Section 522(f)(1) places the ordinary judicial lien holder back where he bargained to be: with the unsecured creditors. However the holder of a confessed judgment against real estate who records his judgment at the time he loans money to the debtor is secured from the start. The substance of the transaction is that of a security agreement, not a judicial lien.

The Commonwealth obtains its confessed judgment to secure the repayment of public assistance. The judgment is taken contemporaneously with the disbursement of public assistance funds. The transaction is intended to make DPW a secured creditor. Consequently the Third Circuit erred in holding that such confessed judgments are "judicial liens" subject to avoidance under the Bankruptcy Code.

CONCLUSION

It is respectfully submitted, for the reasons set forth above, that the Petition for a Writ of Certiorari should be granted to review the opinion and judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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